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IN THE

Supreme Court of the United States

October Term, 1956

SCHAFFER TRANSPORTATION COMPANY and AMERICAN TRUCKING ASSOCIATIONS, INC., *Appellants*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal from the United States District Court for the District of South Dakota, Northern Division

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants, A. W. Schaffer, doing business as Schaffer Transportation Company, and American Trucking Associations, Inc., hereinafter called Schaffer and A.T.A., appeal from the judgment of the United States District Court for the District of South Dakota, Northern Division, entered on May 25, 1956, sustaining an order of the Interstate Commerce Commission, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court is reported at 139 F. Supp. 444, and a copy is attached hereto as Appendix

A. A copy of the judgment of the District Court is attached hereto as Appendix B. A copy of the report and order of Division 5 of the Commission, holding that the public convenience and necessity required Schaffer's proposed operations, is attached hereto as Appendix C. A copy of the report and order of the Commission, 63 M.C.C. 247, reversing the decision of Division 5, is attached hereto as Appendix D. A copy of the Commission's order of May 16, 1955, granting A.T.A. leave to intervene but denying reconsideration and oral argument, is attached hereto as Appendix E.

JURISDICTION

This suit was brought to set aside the report and order of February 7, 1955, of the appellee, Interstate Commerce Commission, in Docket No. MC-93529 (Sub-No. 2), *A. W. Schaffer Extension—Granite*, 63 M.C.C. 247, pursuant to Section 205(g) of the Interstate Commerce Act, 49 U.S.C. § 305(g), Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, and Sections 1336, 1398, 2284 and 2321-2325, inclusive, of the Judicial Code, 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325. The judgment of the United States District Court for the District of South Dakota, Northern Division, was entered on May 25, 1956, and notice of appeal was filed in that Court on July 19, 1956. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Contract Steel Carriers, Inc.* —— U.S. ——, 76 S. Ct. 461; *United States* v. *Watson Bros. Transportation Co.*, —— U.S. ——, 76 S. Ct. 302; *M & M Transportation Company* v. *United States*, 350 U.S. 857.

QUESTION PRESENTED

Is a motor carrier, in applying for operating authority pursuant to the provisions of Section 207 of the Interstate Commerce Act, 49 U.S.C. § 307, required to prove that existing *rail* service is inadequate?

Stated another way, the question may be put thusly:

Under the scheme of regulation adopted by Congress and embodied in the Interstate Commerce Act and the National Transportation Policy are the shippers of the country entitled to service by all available forms of transport, or may the Interstate Commerce Commission determine that only the services of rail transport shall be utilized?

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding § 1, and Sections 206 and 207 of the Interstate Commerce Act, as amended, 49 U.S.C. §§ 306, 307, are set forth verbatim in Appendix F hereof.

STATEMENT

This proceeding affords this Court the first opportunity to pass on the power of the Commission to refuse to allow the institution of motor carrier service because of the availability to the shippers, who desire and support the need for such service, of *rail* service which the Commission considers adequate or "reasonably" so. The answer to the question posed is important as a guide to the Interstate Commerce Commission in its administration of the Interstate Commerce Act and to the shippers of the country who desire to use service by motor vehicle, as well as that offered by rail carriers.

For the first fifteen years of federal regulation of motor vehicles operating in interstate commerce pursuant to the Motor Carrier Act of 1935,[1] the Interstate Commerce Commission consistently held that shippers were entitled to adequate service by motor vehicle as well as rail. However, commencing in 1950, the Commission made an abrupt about-face, and in several cases concluded that motor carrier authority would not be granted where the applicant failed to show that existing rail service was inadequate to meet the shippers' needs.[2]

The Commission's departure from the established policy of fostering reasonable competition between the various modes of transportation subject to its jurisdiction is a matter of serious concern to the trucking industry. In order to test the validity of the Commission's newly-developed theory that existence of adequate *rail* service bars the right to institute service by motor vehicle, appellant A.T.A. has intervened in several application proceedings before the Commission in which it has adopted that theory.[3] However, in each of the cases referred to the Commission has simply decided, on the same record,[4]

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[1] 49 Stat. 543 *et seq.*, now Part II of the Interstate Commerce Act, 49 U.S.C.A. §301 *et seq.*

[2] *Kenosha Auto Transp. Corp. Ext.*, 52 M.C.C. 123, *Hayes Freight Lines Inc., Ext.—Ball Clay*, 52 M.C.C. 303.

[3] Docket No. MC-10900 (Sub-No. 16), *McCullough Transfer Co. —Extension—Cement in Bulk* (January 6, 1953); Docket No. MC-111472 (Sub-No. 20), *Diamond Transportation System, Inc., —Extension—Burlington, Iowa* (May 11, 1954); Docket No. MC-11785 (Sub-No. 2), *Fred C. Burns—Extension—Rough Lumber* (November 15, 1954); Docket No. MC-113855, *International Transport, Inc.,—Extension—Tractors and Farm Machinery* (February 15, 1955); Docket No. MC-29886 (Sub-No. 72), *Dallas & Mavis Fwdg. Co., Inc., Ext.—Sweepers* (October 17, 1955).

[4] Except in the *McCullough* case, *supra*. When the Commission denied reconsideration in *McCullough*, complaint was filed by the applicant therein and A.T.A. in the U. S. District Court for the

that the rail service first considered adequate was, on reconsideration, inadequate to meet the shippers' needs, and therefore motor carrier authority should be granted.

The importance to the motor carrier industry of the question presented here is obvious. If the Commission's construction of the law is correct, motor carriers will never get a chance to compete with the railroads in many instances, for a finding by the Commission that the existing rail service is reasonably adequate will, *ipso facto*, bar the institution of motor carrier service. In addition, certain shippers will find themselves, with only rail service to rely on, attempting to compete in common marketplaces with other shippers having the benefit, as to both rates and service, of competition between the two forms of transportation.

The Commission's report on reconsideration complained of herein violates the underlying purpose of the Interstate Commerce Act and contravenes the provisions of the National Transportation Policy in arbitrarily refusing to authorize the institution of the motor carrier service sought to be provided, and thereby promoting railroad monopoly.

By application filed May 28, 1951, as amended, Schaffer sought from the Interstate Commerce Commission a certificate of public convenience and necessity authorizing operations, in interstate commerce, as a common carrier by motor vehicle of granite, manufactured and rough, (1) from points in Grant County, South Dakota, to points in ten states (primarily in the East) and the District of Columbia, and (2) from points in Vermont to points in

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Northern District of Ohio (Eastern Division) to test the validity of its ruling. However, before the court case had proceeded further, the Commission reopened its docket, held further hearings and ultimately authorized three motor carriers to transport cement in bulk, the commodity in question.

sixteen states (primarily in the Midwest), over irregular routes. After appropriate proceedings, the report and order of Division 5 of the Commission in Docket No. MC-93529 (Sub-No. 2), *A. W. Schaffer Extension—Granite*, dated May 24, 1954, found that the public convenience and necessity required the proposed operations substantially as requested,[5] that Schaffer was fit, willing and able properly to perform such service and to conform to the applicable laws and regulations and that a certificate authorizing such operations should be granted.

Following petition of numerous protestant railroads, Division 5, by order of November 12, 1954, reopened the proceeding for reconsideration on the same record. Subsequently, the entire Commission assumed jurisdiction of the proceeding. The report and order of the Commission dated February 7, 1955, 63 M.C.C. 247, reversed the decision of Division 5 and stated that the record did not sustain the prior finding that public convenience and necessity required the proposed operations. The Commission, Commissioners Cross, Arpaia, Clarke and Winchell, dissenting, determined that the application should be denied, and the prior order of May 24, 1954, was vacated and set aside.[6]

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[5] Because Dingmann, the only motor carrier protestant, is authorized to transport granite from points in Grant County, S. D., to points in certain states covered by Schaffer's application, and because Dingmann's service was not shown to be unsatisfactory, Division 5 denied Schaffer's request for authority to serve points covered by Dingmann's certificate, i.e., Maryland, Connecticut, Massachusetts, Vermont, and the District of Columbia. Neither of the appellants complains as to this partial denial.

[6] The desirability of review by this Court, in order to settle finally the question involved herein, is emphasized by the closeness of the vote in the Commission. The vote of six to four (one Commissioner not participating) denying Schaffer's application resulted when one of the Commissioners who, as a member of Division 5 had voted to grant the application, changed his vote on reconsideration.

It is noted that the advance sheets reporting the Commission's

By petition dated March 4, 1955, Schaffer requested reconsideration by, and oral argument before, the Interstate Commerce Commission. By petition dated March 9, 1955, A.T.A. requested leave to intervene, reconsideration by and oral argument before, the Commission. By order of May 16, 1955, the Interstate Commerce Commission granted leave to intervene to A.T.A., but denied the petitions for reconsideration and oral argument.

Appellants, plaintiffs below, brought this action in the District Court to review the ruling of the Commission. The Court twice indicated in its opinion that it disagreed with the Commission's ultimate conclusion that public convenience and necessity did not require that Schaffer's application be granted, (139 F. Supp. 450, 452); nevertheless, it found that the Commission acted within the scope of its authority, without abuse of discretion, that its action was not arbitrary or capricious, that there were adequate facts to support its findings and that its conclusions were not contrary to law, and dismissed the complaint.

THE QUESTION IS SUBSTANTIAL

The issue involved in this appeal is of importance to the shipping public, the motor carrier and railroad industries, and to the administration of the Interstate Commerce Act. The report and order of the Commission which gave rise to this proceeding flouts the mandate of the National Transportation Policy, in that it denies to the shippers involved the inherent advantages of the motor carrier service sought to be provided, and in so doing

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decision are in error in failing to show Commissioner Winchell as dissenting, as indicated by the Commission's official minutes. This error has been called to the Commission's attention and we have been informally advised by the Secretary's office that the bound volume will be corrected.

fails to promote the adequate, economical and efficient service which can only be achieved through reasonable competition between the various forms of transportation subject to its jurisdiction. The District Court erred in failing to find that the basic reason for the denial of the authority sought was the Commission's determination that the existing rail service was adequate to meet the supporting shippers' needs. The Court's holding that this was not the basis for the Commission's action (139 F. Supp. 451) is erroneous, at least to the extent that it fails to recognize that the Commission's report and order are substantially, if not completely, dependent for support upon its conclusion that rail service was all that the supporting shippers really needed.

1. From the earliest times, the Commission has recognized that the Interstate Commerce Act requires the maintenance of competition between the transportation agencies subject to its jurisdiction. In one of its first opinions, written by Chairman Cooley, in *Re Southern Railway & Steamship Asso.*, 1 I.C.C. 278, 287, (1887) it is stated:

> In thus deliberately making provision for competition . . . Congress must be supposed to have done so because the public interest required it. That competition is the life of trade is one of the most generally accepted of maxims; among its principal benefits is the protection it gives against extortionate charges.

And [illegible] years later, in *Naval Stores From Mississippi to Gu[illegible]* 35 I.C.C. 723, 733 (1940), the Commission said:

> Healthy competition between different agencies of transportation is undoubtedly in the public interest.

This Court has itself pointed out that the Commission "is trusted by Congress to guard against the danger of the development of a transportation monopoly. * * * It has the duty to preserve the inherent advantages of each mode of transportation." *I.C.C.* v. *Parker*, 326 U.S. 60, 73.

2. From the outset of federal regulation of motor carriers the Commission consistently recognized that the policy of Congress required it to make available to the shippers of the country adequate motor vehicle, as well as rail, service. This policy was established in conformance with the provisions of Section 202(a) of the Motor Carrier Act, 1935, reading, in part, as follows:

> ". . . to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest, promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices . . ."

In one of the earliest decisions construing the cited language, *Bowles Common Carrier Application*, 1 M.C.C. 589, 591 (1937), the report of the Commission, Division 5, states:

> Interveners point out that the growth of motor-carrier transportation, and consequent diversion of traffic from the rails to the highways, has contributed to large traffic losses by rail carriers, a diminution of their revenues, and an impairment of the value of their securities. They contend that the public convenience and necessity do not require the proposed services and that the grant of a certificate to applicant would be inconsistent with the policy of Congress declared in section 202(a) of the Act. One of the bases for this contention is that all of the origins and all of the destinations, except Elkhorn, now have adequate service by rail. We are advised by statute that it is the policy of Congress to foster and preserve in full vigor both rail and water transportation, but we are also directed in section 202(a) to regulate transportation by motor carriers in such manner as to recognize and preserve its inherent advantages. There are certain inherent advantages in the transportation of petroleum products by motor

vehicle. Among these are the reduction in amount of gasoline and other petroleum products which jobbers must keep on hand in storage tanks, and the elimination of the expense of trucking rail shipments of such products at destinations from tank cars to those jobbers who do not have storage facilities adjacent to the rail carriers' tracks. *That a particular point has adequate rail service is not a sufficient reason for denial of a certificate; shippers and consignees of petroleum are entitled to adequate service by motor vehicle as well as by rail.* (Emphasis ours.)

The principle established in the *Boucles* case was followed down through the years in a multitude of cases involving applications by motor carriers. See, e. g., *England Transp. Co., Inc., Extension—Mississippi Points*, 49 M.C.C. 567, 571. And when denial of applications filed by water carriers and freight forwarders was urged on the ground that existing rail and truck service was adequate to meet the shippers' needs, the Commission has uniformly held that shippers are also entitled to adequate water carrier and freight forwarder service. *Commercial Barge Lines, Inc., Ext.—Automobiles*, 260 I.C.C. 701, 709; *Goldberg Freight Forwarder Application*, 285 I.C.C. 239.

The Commission, Division 4, has quite recently reiterated this view. In Docket No. W-381 (Sub-No. 5); *Federal Barge Lines, Inc., Extension—Sioux City*, decided July 31, 1956, it is stated:

> Moreover, even though the evidence indicates that shippers in the territory involved have adequate rail and motor service and that the proposed service would provide low-cost transportation such a showing, standing alone, does not warrant denial of an application for authority to perform water carrier operations. See *War Shipping Administration T. A. Application*, 260 I.C.C. 589; and *Inland Waterways Corp. Extension of Operations—Omaha*, 265 I.C.C. 207. Under part III of the act it has been found that the shipping public is entitled to the inherent advantages of water as well as rail service where a need for water transportation is shown.

Congress, by the Transportation Act of 1940, 54 Stat. 899 *et seq.*, repeated and substantially reenacted the provisions of Section 202(a) of the Motor Carrier Act as part of the National Transportation Policy. It must be presumed to have done so with full knowledge of the Commission's construction of Section 202(a), and to have approved and confirmed such construction. *N. Y., N. H., & H. R. Co.* v. *I.C.C.*, 200 U.S. 361.

As this Court said, in *Brewster* v. *Gage*, 280 U.S. 327, 337:

> The substantial reenactment in later acts of the provision theretofore construed by the Department is persuasive evidence of legislative approval of the regulation (citing cases). The subsequent legislation confirmed and carried forward the policy evidenced by the earlier enactments as interpreted in the regulations promulgated under them.

3. Despite its consistent interpretation, uniformly followed for many years, and despite Congressional approval thereof, the Commission has recently reversed its long-standing policy, as it has done herein, and now holds that motor carrier service may not be authorized unless it is first shown that existing rail service is not adequate for the shippers' needs. The fact that such a policy does violence to the Interstate Commerce Act and the National Transportation Policy is emphasized by the Commission's contemporaneous holding, in other proceedings, that motor carrier service has certain inherent advantages which can not be duplicated by rail service. Thus, in *Canned Goods in Official Territory*, 294 I.C.C. 371, 379, the report of the Commission states:

> There are inherent advantages of motor transportation which have no counterpart in rail service. It is individualized, expedited, and more flexible than rail transportation.

A comparison of the rationale of the decision herein and the cited language of the *Canned Goods case* affords a strange contrast—on the one hand, in this proceeding,

the Commission held, in effect, that the motor vehicle service proposed offered no inherent advantages over the rail service already in existence. On the other hand, the same agency, just two weeks later, in another proceeding, repeated its earlier holdings to the effect that motor vehicle service has certain inherent advantages not found in rail service. The National Transportation Policy admonishes the Commission to recognize and preserve the inherent advantages of motor carrier service. That policy is not conformed to by a refusal to authorize service which would make those inherent advantages available to shippers, on the ground that existing rail service is adequate to meet the shippers' needs.

It is submitted that the report and order of the Commission complained of herein and the decision of the District Court upholding it fail to comply with the mandate of the National Transportation Policy requiring that the inherent advantages of motor carrier service be recognized and preserved, and adequate, economical and efficient service be promoted. The question presented by this appeal is substantial and of public importance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 14th day of September, 1956, I served copies of the foregoing document on the several parties thereto, as follows:

1. On the United States, by mailing a copy thereof in a duly addressed envelope, with airmail postage prepaid, to Clinton G. Richards, Esq., United States Attorney, Sioux Falls, S. D., and by mailing a copy in a duly addressed envelope, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the intervening railroads, by mailing copies in duly addressed envelopes, with airmal postage prepaid, to H. F. Chapman, Esq., Security Bank Building, Sioux Falls, S. D., and Amos M. Mathews, Esq., 280 Union Station Building, Chicago 6, Illinois.

PETER T. BEARDSLEY